No. 83-1237

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1983

FRANCISCO SANCHEZ-MARTINEZ,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICES,
Respondent.

BRIEF OF AMICI CURIAE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND AND AMERICAN G.I. FORUM OF THE UNITED STATES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. INTEREST OF AMICI CURIAE

Amicus Curiae American G.I. Forum of the United States, is a national hispanic veterans' organization with a membership of over 100,000 founded in 1948 in Corpus Christi, Texas. The largest number of G.I. Forum's members are in Texas and other border states, which have in past decades had large populations of Mexican-American families which migrated back and forth across the border. Many of G.I. Forum's members have encountered native-born citizens of Mexican heritage who, like petitioner, cannot document their birth.

Amicus curiae Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights law organization dedicated to protecting and extending the rights of Mexican Americans. MALDEF has vast experience and contact with Mexican American citizens in all areas of the country, of all ages, and from all social, economic, and family backgrounds. In the course of these contacts, we have become aware that the plight of

petitioner in this case is by no means uncommon among Mexican Americans of older generations.

II. INTRODUCTION

MALDEF and G.I. Forum respectfully submit this brief amicus curiae in support of petitioner's request for review of the holding by the Ninth Circuit Court of Appeals that a decision rejecting a claim of United States citizenship under 8 U.S.C. §1105a(a)(5) must be affirmed unless it is "clearly erroneous." Upon that seemingly narrow issue turns the right of petitioner and his children to the most "precious" liberty -- "the right to have rights" -- to which an individual in this country can lay claim. Schneiderman v. United States, 320 U.S. 118, 125 (1943); Perez v. Brownell, 356 U.S. 44, 64 (1958), overruled on other grounds, Afroyim v. Rusk, 387 U,S. 253 (1967). Amici submit this brief because the issue petitioner presents for review is likely to be similarly determinative in many cases involving Mexican-Americans.

In light of the obvious importance of the constellation of rights surrounding citizenship, this Court has repeatedly held the government to an exacting standard of proof in cases involving citizenship and related matters. The decision below not only represents an inexplicable departure from this stringent standard, but creates a distinction between citizenship based on "naturalization" and "birth" which is incapable of defense on any principled basis. Indeed, we submit that a standard of review which places in greater jeopardy the rights of persons who claim their citizenship through birth rather than naturalization is untenable on its face. Moreover, the impact of the decision below will fall harshly upon many thousands of United States citizens situated similarly to petitioner. While the specific issue decided by the Ninth Circuit has not been resolved by this Court, decisions in closely related cases demonstrate not only the need for review, but the manifest error of the holding below.

III. REASONS FOR GRANTING THE WRIT

A. The Standard of Appellate Review of District Court Nationality Determinations Involves a Matter of Exceptional Importance.

The issue presented by this case is whether the Court of Appeals in a proceeding under 8 U.S.C §1105a(a)(5) must independently determine whether the government has shown by "clear, unequivocal and convincing" evidence that a person who it seeks to deport as an alien is, in fact, an alien and not a citizen of the United States. There can be no doubt from a review of the record in this case or even the Ninth Circuit's cautious opinion that if such review is required, Mr. Sanchez will be permitted to remain in this country as an American citizen, along with his children who claim their citizenship through him.

Amici submit that the summary treatment of this matter by the Court of Appeals fails to recognize either the importance or the complexity of the issue presented; nor, with all respect, does it reflect a fair appreciation of the Congressional scheme underlying

determinations of citizenship or this Court's consistent approach to that issue.

1. This Court has spoken repeatedly, and with fervor, of the importance attached to the right to be a citizen, or even to remain a resident, of this country. Citizenship has been described as a "precious" right (Fedorenko v. United States, 449 U.S. 490, 505 (1981) and as "man's basic right for it is nothing less than the right to have rights." (Perez v. Brownell, supra, 356 U.S. at 64 (Warren, C.J., dissenting). "It would be difficult to exaggerate its value and importance." Schneiderman v. United States, supra, 320 U.S. at 122. The consequence of its loss "is more serious than a taking of one's property or the imposition of a fine or other penalty." Schneiderman, supra. Indeed, loss of citizenship, or an order of deportation, "may result in the loss 'of all that makes life worth living'." Knauer v. United States, 328 U.S. 654, 659 (1946) (quoting Ng Fung Ho v. White, 259 U.S. 276, 284 (1922)). Yet for

the vast majority of people in the United States, citizenship is taken for granted and never becomes more than a momentary, and perfunctory, issue in their lives.

Such issues arise with greater frequency among persons who have come to this country as aliens and seek either to reside here permanently or to obtain American citizenship through naturalization. For obvious reasons the government imposes conditions on aliens and persons seeking to become naturalized citizens that it may not impose upon persons who have acquired their citizenship by birth or descent. Foremost among those conditions is that the government may -- in limited circumstances -- deport aliens or revoke the citizenship of naturalized Americans.

2. We begin with that rather elementary discussion because the basic taxonomy noted above (aliens, naturalized citizens, citizens by birth) is critical to an understanding of why review should be granted in this case. Given the recognized importance of

the rights at issue, this Court has consistently held that the citizenship of a naturalized American may be revoked only where the government establishes its case for denaturalization by "clear, unequivocal and convincing" evidence. Schneiderman v. United States, supra, 320 U.S. 118; Baumgartner v. United States, supra, 322 U.S. 665; ; Nowak v. United States, 356 U.S. 660 (1958); Chaunt v. United States, 364 U.S. 350 (1960); Fedorenko v. United States, supra, 449 U.S. at 505-06.[1] Moreover, on appeal from a determination adverse to the citizen, the lower court's decision is subject to "independent determination" by the reviewing court. As this Court noted in Chaunt v. United States, supra, 364 U.S. at 353:

> The issue in [denaturalization] cases is so important to the liberty of the citizen that the weight normally given concurrent findings of two lower courts does not preclude reconsideration here . . . .

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1 That standard "in effect approximates the burden demanded for conviction in criminal cases . . . ." Klapprott v. United States, 335 U.S. 601, 617 (1949) (Rutledge, J. concurring).

See also Baumgartner v. United States, supra, 322 U.S. at 670-71; Nowak v. United States, supra, 356 U.S. at 663 ("[I]t becomes our duty to scrutinize the record with the utmost care."); Knauer v. United States, supra, 328 U.S. at 657.

The sanction available against aliens is, of course, deportation rather than denaturalization. Deportation, by and large, involves administrative proceedings and the rights available to an alien are, unquestionably, less than those which attach to American citizens (whether through birth or naturalization). In recognition of the strong "family social and economic ties" frequently established by resident aliens, this Court has insisted that proof in an administrative deportation proceeding be by the same standard of "clear, unequivocal, and convincing" evidence which is required in denaturalization proceedings. Woodby v. Immigration and Naturalization Service, 385 U.S. 276, 282-84 (1966). However, unlike the situation in

denaturalization cases, the administrative decision in such matters will be upheld on appeal if it is "supported by reasonable, substantial and probative evidence on the record considered as a whole . . . ," that is, if it is not clearly erroneous. 8 U.S.C. §1105a(a)(4).

3. We come, now, to the situation presented by the instant case. The action commenced by the INS against petitioner Sanchez was, in form, a deportation proceeding. That action was commenced upon the necessary assumption that petitioner is an alien, i.e., not an American citizen. However, in recognition of the fact that citizenship by birth is, in many respects, the highest form of American citizenship, 8 U.S.C. §1105a(a)(5) expressly provides that where "a genuine issue of material fact as to . . . nationality is presented," as it was here, the administrative proceedings must be terminated and the matter transferred to the District Court for a wholly separate "hearing de novo

of the nationality claim" in a declaratory relief proceeding. Moreover, although the statutory requirement of a specific judicial determination of citizenship in such cases makes obvious sense as a policy matter, given the critical nature of the right in issue, the requirement is not a matter of statutory grace, but of constitutional due process.[2]

The District Court passed upon petitioner's citizenship claim applying the requisite "clear, unequivocal and convincing" standard.[3] The Court of Appeals affirmed on

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2 In Ng Gung Ho v. White, supra, 259 U.S. 276, Justice Brandeis, speaking for a unanimous Court, noted that "[j]urisdiction in the executive to order deportation exists only if the person arrested is an alien. . . . To deport one who so claims to be a citizen obviously deprives him of liberty . . . It may result also in loss of both property and life; or of all that makes life worth living. Against the danger of such deprivation with the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law." 259 U.S. at 284-85.

3 The Court of Appeals not only held that it was required to affirm the District Court's decision unless "clearly erroneous" but also questioned -- without (footnote continued)

the ground that the decision of the district court was not "clearly erroneous." In following what the court termed its "normal practice" the Ninth Circuit expressly rejected petitioner's argument that independent review was required. Moreover, it did so without even a reference to this Court's decisions in

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(footnote continued from previous page)
deciding -- whether the "clear, unequivocal and convincing" standard should have been applied in the District Court. See Appendix I to the Petition for Certiorari at A-4. The court's expressed doubt on that point is, with all respect, untenable in light not only of the many decisions of this Court cited in text, but a number of Ninth Circuit decisions including Iran v. Immigration and Naturalization Service, 656 F.2d 469, 471 (9th Cir. 1981) in which the court noted that:

> [i]n deportation proceedings, the INS has the burden of proving deportability by 'clear, unequivocal and convincing evidence' [Woodby]. To prove deportability the INS must show that the subject of the deportation proceedings is an alien. . . . As a part of its burden, therefore, the INS must prove 'alienage,' i.e., that the subject of the proceeding is an alien.

See also Sandoval-Vera v. Immigration and Naturalization Service, 667 F.2d 792, 793 (9th Cir. 1982).

cases such as Baumgartner, Knauer or Chaunt.[4]

We freely concede that in so holding the court below did not expressly contradict any direct decision of this Court. It did, however, effectively frame the important issue which necessitates review here:

> Must the claims of a person who raises a genuine issue 5 that he or she is an American citizen as a matter of right (by birth or descent) be treated at least as

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4 The only case on the point which was discussed by the court below is Lim v. Mitchell, 431 F.2d 197 (9th Cir. 1970) in which the Ninth Circuit required an "independent determination" on appeal in a declaratory judgment action involving a citizenship claim. The court distinguished Lim as involving "special circumstances" without bothering even to note -- let alone discuss -- the earlier decisions of this Court (Chaunt and Knauer) which were cited and relied upon by Lim as the basis for the "independent determination" requirement. See 431 F.2d at 199.

5 Any concern that applying the standard of review urged by petitioner will complicate or frustrate INS policy is answered by the threshold requirement of section 1105a(a)(5) that the claim of nationality be supported by a "genuine issue of material fact." Moreover, since the issue presented has to do only with the standard of review on appeal, it is hard to see what additional burden or complication could be claimed in any event.

well on appeal as those of a naturalized citizen?[6]

There is, of course, no doubt as to how amici believe that question should be answered. However, the point for present purposes is that it is a question of sufficient moment to require consideration by this Court. The importance attached to loss of a bona fide claim of American citizenship is of such obvious substance that there should be no ambiguity concerning the legal standards under

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6 The point may be depicted graphically as follows:

Nature of Proceeding	District Court Burden of Proof	Scope of Appellate Review
Non-frivolous nationality claims (declaratory relief)	Clear, Unequivocal and Convincing	
Denaturalization proceeding	Clear, Unequivocal and Convincing	Independent Review
Administrative deportation of aliens	Clear, Unequivocal and Convincing	Substantial Evidence (Clearly Erroneous)

which such a determination is to be made. Cf. Nishikawa v. Dulles, 356 U.S. 129, 136 (1958) ("'Rights of citizenship are not to be destroyed by an ambiguity.'") (quoting Perkins v. Elg, 307 U.S. 325, 337 (1939)).

The Ninth Circuit's summary treatment of this critical issue is, with all respect, insupportable. It relegates individuals who have lived useful lives in a good-faith belief that they are both entitled to the rights and owe the responsibilities[7] of American citizenship to a status inferior to persons who have secured their citizenship through naturalization. To note that fact is in no way to demean the status of naturalized Americans; it is, rather, to demonstrate the untenability of the decision below and the consequent need for review by this Court.

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7 Petitioner lived much of his early life in Mexico. When he became 18 he returned to the United States to register for the draft (II RT 140-41, Ex.1). He has remained here ever since as a productive member of American society, working and raising a family of four children in this country.

B. Thousands of Native-Born United States Citizens Who May Require Citizenship Determinations Are Potentially Subject to the Standard of Review Established in the Case.

Both the circumstances of petitioner's birth and the absence of irrefutable formal proof of those circumstances are typical of many thousands of similarly-situated citizens of the United States. Those individuals were born in the border area of this country into immigrant families whose roots remained in Mexico. Because their births were often not in hospitals or attended by physicians, and their parents were unaware of or indifferent to American formalities, no birth certificates were recorded.

1. The first thirty years of this century witnessed a massive migration of Mexican people, mostly laborers, to the southwestern United States. While no one knows precisely the number of Mexican immigrants who entered the United States in that period, it is generally thought to exceed one million

persons.[8] Many of these immigrants entered openly without documents or formalities, since the border was a loosely defined barrier in those years.[9] Once installed in the United States, the immigrants and their families lived in "colonies" almost completely isolated from the institutions of American Society and from the native American population.[10]

The wave of Mexican immigration coincided with the birth of the southwestern states as an ecomomic empire.[11] Mexicans came to pick cotton and other agricultural produce, mine copper, and build railroads. The need for labor in many industries was so intense that

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8 Carey McWilliams, North from Mexico, p. 163 (1949).

9 See Abraham Hoffman, Unwanted Mexican Americans in the Great Depression, p. 11 (1974).

10 Mercedes Carreros de Velasco, Los Mexicanos Que Devolvio La Crisis, 1929-1932, (Mexico, D.F. 1974), p. 40.

11 McWilliams, supra, p. 163.

many "recruiters" smuggled workers across the border.[12]

A significant number of Mexican workers left the country as abruptly as they came. Long before the Depression, many Mexicans returned to Mexico "with relative ease to demonstrate the skills acquired and possessions obtained, to spend or invest the wealth earned ...."[13] Others left less properous. In 1921 when the World War I cotton boom exploded, ten thousand workers were left stranded and destitute in Arizona's Salt River Valley necessitating temporary relief from the Mexican counsul.[14] When the Depression began and domestic employment rose, thousands of

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12 Joan W. Moore, Mexican Americans, p. 22 (1970)

13 Hoffman, supra, p. 25. See also, John Martinez, Mexican Emigration to the U.S. 1910-1930, p. 75 (unpublished Ph.D. thesis at University of California, Berkeley, reprinted in 1971, by R. and E. Research Associates, San Francisco) where it is noted that in the early 1920's the Mexican government formed a Department of Repatriation.

14 McWilliams, supra, p. 174.

workers "[d]issappointed in their hopes of earning adequate wages...recrossed the border of their own volition...."[15]

The repatriation movement had its beginnings in 1931. Threatened by the federal government with deportation, and "persuaded" by local governments and welfare agencies, Mexican immigrants boarded trains that returned them to Mexico. Over 350,000 Mexican immigrants were repatriated in the four year period 1929-1932.[16] In the early thirties in Arizona, thousands of men were pulled from Works Progress Administration relief projects and loaded, families and all, on trains that carried them into Mexico.[17] Whole families were uprooted and followed the working parent back to his place of origin across the border,

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15 Hoffman, supra, p. 38.

16 McWilliams, supra, at 174.

17 Raymond Johnson Flores, The Socio-economic Trends of the Mexican People Residing in Arizona, p. 6 (unpublished thesis at Arizona State College, reprinted in 1973 by R. and E. Research Associates, San Francisco).

or elsewhere in Mexico. One contemporary observer noted that,

> Children of repatriated Mexican parents, including many American-born children with alien parents, are causing great concern to the welfare authorities in these areas. It was reported that some 15,000 such children with their parents went through Nogales, Arizona, just across the border from Nogales, Mexico, on their way back to Mexico. Many of these children have drifted back to the United States, particularly older children, and are living hand to mouth in Arizona.[18]

Inevitably, many of those repatriated sought re-entry into the United States by legal or illegal means. Many of the repatriated children were legally entitled to American citizenship,[19] although they could not document that fact. George P. Clements of the Los Angles Chamber of Commerce, who observed

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18 Id. at 6, quoting Katherine F. Senroot, "The Children's Bureau and Problems of the Spanish-Speaking Minority Groups" (unpublished mimeographed memorandum, United States Department of Labor, Childrens' Bureau, Washington, D.C., April, 1943, p.1). See also, Carreras de Velasco, supra, at p. 98.

19 Hoffman, supra, p. 148.

the departure of one of the repatriation trains, remarked:

> No child could return, even though born in America, unless he had documentary evidence and his birth certificate and was able to substantiate this, the burden of proof being placed entirely on the individual. This means that something like 60% of these children are American citizens without very much hope of ever coming back into the United States. 20

Clements' assumption that U.S. citizen children without documents could never return was naive, however, since they, like their parents, found undocumented border crossing easy for many years to come. Unlike their parents, however, those children had the right to enter, and were returning to their native land rather than setting off to cross a previously unknown frontier.

2. Without birth certificates or other formal proof of birthplace, United States citizens of Mexican family background are often hard-put to prove their citizenship. The question of citizenship may arise with some regularity in cases of this nature. See,

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20 Id., at 95.

e.g., Matter of Serna, Interim Decision No. 2681 (B.I.A. 1978) (visa application, applicant claiming citzenship by birth), Matter of Herrera, Interim Decision No. 2096 (B.I.A. 1971)(same); Matter of Lugo-Guardiana, Interim Decision No. 1861 (B.I.A. 1968) (deportation proceeding, issue as to validity of delayed birth certificate showing citizenship by birth); Matter of HH & HM, 3 I & N Decisions 680 (B.I.A. 1950) (issue as to validity of passport based on claim of citizenship by birth); Casares-Moreno v. United States, 226 F.2d 873 (9th Cir. 1955)(criminal proceeding, issue as to validity of delayed birth certificate showing citizenship).

As the foregoing citations illustrate, the circumstances of petitioner's birth are not unique and the issue posed by the need to determine those circumstances with precision is recurrent. To apply the same legal standard to persons who claim to have been born in this country in such circumstances as that applicable to aliens without any colorable

claim of citizenship would be to blink at the reality of the American Southwest's history and the thousands of undocumented native births that it produced.

CONCLUSION

For the foregoing reasons the petition for certiorari should be granted.

Dated: April 9, 1984.

Respectfully submitted,

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